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THE FUTURE OF THE CRIMINAL LAW*

In the middle of the sixteenth century, so Maitland tells us, "in criminal causes that were of any political importance, an examination by one or two doctors of the civil law threatened to become a normal part of our procedure." [1] For a time, indeed, judicial criminal justice, dispensed in the king's courts of common law, seemed to be giving way before executive criminal justice dispensed or dispensed with in administrative tribunals. [2] In like manner today, in a period that has much in common with Tudor and Stuart England, the function of securing social interests through punitive justice seems to be insensibly slipping away from courts and hence from law and in substance, if not in form, to be coming more and more into the hands of administrative agencies. For example, the current of modern legislation is reducing the sentence of the court in all important prosecutions to a mere form, and is committing determination of the actual nature and duration of penal treatment of offenders to boards of probation and parole. In a growing number of jurisdictions, a preliminary report by alienists or psychiatrists, before prosecution, may determine a crucial issue for practical purposes. In case of factory acts, housing laws, pure food laws, laws for protection against fire and sanitary laws, to-day we commonly remove the whole subject in substance from the domain of judicial prosecution and turn it over to boards and commissions, to be dealt with by inspectors and secretaries and agents. In more than one jurisdiction today, after an administrative board has in effect convicted the citizen, it has only to conduct the empty form of a prosecution in a court to conform to the exigencies of constitutional guarantees.

* The substance of this paper is an address delivered before the semi-centennial session of the American Prison Congress, October 15, 1920.

[1] *English Law and the Renaissance* (1901) 22.

[2] Note, for example, the Star Chamber, the Court of the President and Council of the North, and the Court of High Commission, as their jurisdiction is defined by one who was hostile to them, in Coke's Fourth Institute.

So rapid and so continual is the growth of administrative justice to-day, that we may well ask, what is to be the future of the criminal law as lawyers have known it? And this is more than an academic question. For our common law of crimes is a characteristic part of our Anglo-American polity, as well as of Anglo-American law. It cannot decay without accompanying or occasioning far-reaching decay in our legal and political institutions. Hence it behooves the thoughtful lawyer to inquire into the basis of the present tendency and of the conditions that make for it. It behooves him to consider whether the phenomenon is permanent or fleeting. It behooves him to ask what may be done to make our traditional materials for the administration of punitive justice more effective in action for the social ends they are charged to serve or in the alternative to consider whether decadence of our traditional system of criminal justice is inevitable and the struggle to maintain common-law institutions in this instance is destined to be a losing fight.

Criminal law, whether in Roman law or in English law, never attained the systematic perfection that marks the civil side of the law in the one system, at least in the modern world, and is beginning to be found on the civil side of the law in the other also. The great Roman jurists have relatively little to say about it. So far as it is dealt with in the Digest of Justinian, we find but a heap of extracts from juristic writers, who were not primarily concerned with criminal law, thrown together without system or arrangement.[3] Indeed Roman criminal law was crude and unscientific to the last, and none of the great systematic Romanists of the modern world have applied themselves to put system into it although they have been putting system into the civil side of the Roman law for centuries. Yet as soon as any body of law attains sufficient development to distinguish public wrongs from private wrongs, the immediate securing of social interests as such becomes the task of the criminal law. Certainly, then, it is not for any lack of importance in the work of social control, it is not for any insignificance of its role in the process of social engineering which we call the legal order, that the criminal law has failed to enlist the highest powers of the greatest minds that have been busied with the science of law. Nor is it for want of faith in the criminal law as an agency of social control. For whenever a new rule is devised or a new interest is to be secured or a new condition is to be met, lawyer and layman alike turn first to the criminal law. It is true in many of these cases men presently learn better ways. But the first and the staple resource has always been to impose a penalty. We must look to history for an explanation, and perhaps that same history will answer our original question as well.

[3] *Digest*, book 48. A good summary in English may be found in 1 Stephen, *History of the Criminal Law of England* (1883) 12-29.

Before the development of what may in strictness be called criminal law, primitive or relatively primitive social organizations maintain the paramount social interests in the general security, in the security of social institutions, in the general morals, and in the conservation of social resources in many different ways. These archaic modes of social control do the work now done by law and prepare the way for law. Moreover, they shape the conditions in which the formative criminal law arises and thus determine in no small degree its subsequent evolution. First among these modes of social control for the securing of paramount social interests in primitive society is religion. When a wrong has been done a deep-seated human instinct demands that some one be hurt. Every lawyer knows that the average client today is apt to think more of hurting his adversary than of the exact reparation which justice calls for and the law seeks to accord. In the beginnings of society, the infliction of death, whether by public or by private vengeance, may have been simply a realization of this instinct. With the rise of a social conscience and the growth of a spirit of reflection, men demanded some other justification, since civilization involves a conscious putting down of brute instincts. And one way of justifying was found in a religious doctrine that execution was a sacrifice to an offended god who might else inflict his wrath upon the whole community.[4] Lest the community be involved in guilt, the evil thing or the evil man whose impiety was offensive to the gods must be put away. Thus the Twelve Tables direct that the harvest thief be hung as a sacrifice to Ceres.[5] The same Twelve Tables direct that the incendiary be burnt, as it is believed, by way of offering to the fire god.[6] By a Roman statute of the fifth century B. C., if one injured a tribune of the plebs, an aedile or a decemvir judge, his head was devoted to Jupiter and his household was sold at the temple of Ceres.[7] There is some evidence that as late as Caesar's time "the human criminal might sometimes be offered up with the same solemn rites as the brute victim."[8] A law attributed to Numa provided that if one plowed up a boundary stone, both he and the oxen were to be "devoted"[9] and the Roman dictionary writer tells us that a "devoted" man was one whom the people had so adjudged because of crime.[10] It is believed that the

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[4] Mommsen, *Römisches Strafrecht* (1899) 902, 918; Girard, *Histoire de l'organisation judiciaire des Romains* (1901) 33-34; Hermann, *Griechische Rechtsaltertümer* (3rd ed. 1884) 49; 1 Brunner, *Deutsche Rechtsgeschichte* (1906) 175-177; 2 Post, *Grundriss der Ethnologischen Jurisprudenz* (1894-5) § 61.

[5] Girard, *Textes de droit Romain* (4th ed. 1913) 18 (Pliny, *Nat. Hist.* XVIII, 3, 12).

[6] *Digest*, XLVII, 9, 9 (Gaius on the XII Tables).

[7] Livy, III, 55; Muirhead, *Historical Introduction to the Private Law of Rome* (3rd ed. 1916) 78.

[8] 1 Strachan-Davidson, *Problems of the Roman Criminal Law* (1912) 2.

[9] Girard, *Textes de droit Romain*, (4th ed. 1913) 7 (Festus).

[10] Festus, s. v. *Sacer*. 2 Bruns, *Fontes Iuris Romani Antiqui* (6th ed. 1893) 34.

"devoted man" was in the position of a sacrificial victim, awaiting the stroke of the ax before the altar. If he escaped, any man might with impunity dispatch him to his appointed place. And if by accident or the neglect or connivance of the magistrate he evaded the public execution, every man's hand was against him and he fell by the private stroke of the first comer.[11] Thus religious devotion of the criminal to the offended gods becomes outlawry, and the executioner's ax ceases to have religious significance and becomes the symbol of magisterial power.

Another point of origin is in summary community self help, in summary punitive justice by a more or less orderly mob; as it were, an orderly lynch law. In the Germanic law, when a felony was committed the hue and cry was to be raised and the neighbors were to turn out armed and blowing horns to chase the offender.[12] If captured he was summarily hanged or beheaded or thrown from a cliff.[13] In like manner at Rome, when the Plebeian magistrates, who had no lictors and axes, and could not make a solemn sacrifice of the offender, were invoked, the penalty might be to throw the offender from the Tarpeian rock.[14] In such cases, condemnation before a legal tribunal was not a necessary preliminary to this self help of the Plebs any more than to a lynching party to-day.[15] Again, the early law of republican Rome provided for the summary killing without condemnation of the Roman who aspired to kingly power, and Brutus and his fellow assassins actually claimed that they had but executed the law upon the dictator Caesar.[16]

Again, the authority of the state to punish may be thought of as deriving from the conception that the king is father of his country, and has jurisdiction over the individual member of the community as the head of a patriarchal household over a dependent member of that household. The organized kindred, not the individual, was the legal unit of primitive society. Blood relationship, not territorial association, was the great bond of antiquity. For a long time the function of law was merely to keep the peace among groups of kinsmen. The internal discipline of the kindred was a chief agency of social control; and even when the state more and more took over the function of social control, the organized kindred was the model of political organization. Mommsen thinks that much of the beginnings of Roman criminal law may be understood in this way.[17] For instance, we read that the

[11] 1 Strachan-Davidson, *Problems of the Roman Criminal Law* (1912) 8-9 (Macrobius, *Saturnalia* III, 7, 5).

[12] 2 Pollock and Maitland, *History of English Law,* (1895) 576-577.

[13] *Ibid.* 495.

[14] Mommsen, *Römisches Strafrecht* (1899) 933.

[15] *Ibid.* 932.

[16] Livy, II, 8, 2, III, 55, 5; Mommsen, *Römisches Strafrecht* (1899) 552; 2 Mommsen, *Römisches Staatsrecht* (3rd ed. 1887) 88 6/(306).

[17] Mommsen, *Römisches Strafrecht* (1899) 17, 28.

paramour of a vestal was scourged to death by the pontifex, and this suggests a primitive right of the head of a household to avenge his honor against the seducer of his daughter.[18]

Another point of origin is in private self help. Orderly retaliation is the staple of primitive codes. "If one break another's limb," say the Twelve Tables, "unless he agree on a composition, let there be retaliation."[19] Even at this relatively late period, what stood for criminal law still rested to no small extent upon the blood feud. The tribunal granted to the injured person or his kinsmen the leave of the state to deal with the aggressor by way of self help and in the way of retaliation.[20] Indeed down to the Twelve Tables there was still capital punishment in private suits.[21]

There is yet another point of origin in magisterial discipline. The Romans spoke of the *imperium* of the magistrate; of his power to command the citizens to the end of preserving order in time of peace and discipline in time of war. Essentially, this is a military conception, and we must not forget that war was the normal condition of an ancient community. According to Jhering all other non-religious functions of the Roman magistrate are accretions to an original function of commander-in-chief.[22] The aggregate of households and clans which grew into the Roman state required as a primary necessity a leader in time of war. When it came about that this leader was not chosen specially for each emergency but existed as a permanent official, naturally new needs were met by giving new functions to this same official. To take one example, when a leader was required to direct the common efforts of the citizens to extinguish a fire, the man already chosen to command the army was the natural leader to whom to turn.[23] Likewise when someone was required to bring the force of the politically organized community to bear upon those whose conduct endangered the order or safety of the state, men turned as of course to the captain of the host.[24]

Lastly, there is a point of origin in what may be called legislative justice. In a time when legislation, adjudication and administration were undifferentiated, an *ex post facto* law and execution thereof by a

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[18] Girard, *Histoire de l'organisation judiciare des Romains* (1901) 37, n. 1, 106.

[19] Girard, *Textes de droit Romain* (4th ed. 1913) 17 (Festus s. v. *Talio*).

[20] Mommsen, *Römisches Strafrecht* (1899) 62, 940.

[21] *Ibid.* 931; Aulus Gellius, XX, 1, 53.

[22] 1 *Geist des römischen Rechts* (5th ed. 1891) 252-258. On 253 he says: " . . . the political power of the king appears only as an outgrowth of and appendix to his military authority."

[23] "Were you not consul when my house on the Palatine was burning, not by any accident, but set on fire at your instigation? Was there ever a greater fire in this city where the consul did not give assistance? But you sat at your father-in-law's, whose house you opened in order to burn mine, not a putter-out but a setter of fire, and almost in your very capacity of consul supplied burning torches for the fury of Clodius." Cicero, *In Pisonem*, XI, 26.

[24] Mommsen, *Römisches Strafrecht* (1899) 543.

popular assembly or its deputed committee might be a step forward in the evolution of criminal law out of lynch law.[25]

Criminal law, then, grew out of these crude forms of social control; and the difficulties with which it is still beset are involved in a certain common element in the evolution of a legal social control from these primitive materials. "The criminal law begins," says Mommsen, "when the arbitrary action of the holder of power to punish and jurisdiction to judge has limits put upon it by the law of the state or by custom of equal authority therewith. The law points out objectively those unmoral acts which are to be prosecuted on behalf of the community, and at the same time forbids a like prosecution against all others. The law orders the procedure of investigation in positive form. The law lays down a corresponding satisfaction for each wrong. Roman public criminal law begins with the Valerian law, which made the magistrate's sentence of death upon a Roman citizen subject to confirmation by the citizens. . . . Thenceforth at Rome there is no crime without a criminal law, no punishment without a law providing the punishment."[26] At Rome after the expulsion of the kings, those who had authority to punish no longer were competent to meddle with religion, and those to whom religion was committed no longer had authority to punish.[27] The religious sanction of excommunication became a legal sanction of outlawry. In the same way the institution of mob self help acquired legal character. Thirteenth-century England brought the barbaric justice of the hue and cry under judicial control,[28] and the Roman polity in its stage of strict law did the same for the lynch law of the Plebs.[29] As the rising legal system aspired to greater things than merely keeping the peace between warring kindreds, the criminal law and the law of civil injuries slowly grew apart and the former lost all but a few rudiments of the patriarchal character of one of its beginnings. Although down to the last the theory of the Roman law of delicts remained penal, after the Twelve Tables pecuniary penalties and ransom from vengeance are gradually replaced by or turn into civil liability to repair damage; and punishment otherwise than by pecuniary reparation comes to be the domain of public justice.[30] The pristinc free discretion of the Roman magistrate to name such punishment as he pleased for any offense, a power demanded in a less orderly civilization by the exigencies of military discipline and sustained by feelings one

[25] Maine, *Ancient Law*, (4th Amer. ed. 1906) c. 10; 2 Maurer, *Altnorwegisches Staatsrecht und Gerichtswesen* (1908) §§ 2-5; Maurer, *Altislandisches Strafrecht und Gerichtswesen* (1901) § 4. *Cf.* 1 Strachan-Davidson, *Problems of the Roman Criminal Law* (1912) c. 13; Geib, *Geschichte des römischen Civilprocesses* (1842) 48, 68, 170; Burckhardt, *Die Criminalgerichtsbarkeit in Rom bis auf die Kaiserzeit* (1836) 17-19.

[26] *Römisches Strafrecht* (1899) 56.

[27] Girard, *Histoire de l'organization judiciaire des Romains* (1901) 55.

[28] 2 Pollock and Maitland, *History of English Law* (1895) 577-578.

[29] Mommsen, *Römisches Strafrecht* (1899) 932.

[30] *Ibid.* 941.

may readily understand after reading recent discussions of military trials and military sentences during the late war, came to be limited in practice by the interposition of the tribunes unless the case was a petty one with a petty punishment.[35] And although legislative *ex post facto* criminal justice lingered in England in the form of bills of attainder and bills of pains and penalties until the nineteenth century,[32] and in America until put an end to by the federal constitution,[33] at Rome in the period of strict law the substitution of standing committees under standing laws for special committees *pro hac vice* after the commission of a crime, enabled legislative committees to become courts and legislative justice to become judicial.[34] Thus we are brought to the two-fold nature of criminal law as conditioned by its origin and history. On the one hand it is made up of prohibitions addressed to the individual in order to secure social interests, on the other hand it is made up of limitations upon the magisterial enforcement of these prohibitions in order to secure individual interests, or ultimately to secure the social interest in the individual life. For historical reasons, the second of these two sides has long seemed the more important to common-law lawyers and fear of arbitrary magisterial action has often been made a bogie.

Development of criminal law in the form of checks upon crude and arbitrary modes of social control took a course of much significance in shaping the law and the legal thinking of to-day both in Roman law and in our law. Excess of democracy which, as more than one Athenian philosopher saw, made king Demos quite as despotic as any one-man sovereign, made the Athenians reckless in the matter of capital punishment. For the criminal was thought of as standing over against the wrath of the people, and the power of the people as without limit. It was not to be tolerated that any one should stand between the all powerful people and its doing what it thought best.[35] In Rome, on the other hand, a radically different conception obtained. The Roman people did not pursue the offender directly and immediately. The criminal did not stand over against the Roman people, but rather against the magistrate. Hence it seemed to the Roman that the liberty of the people was measured rather by the extent to which the individual might stand up against the magistrate, might challenge his

[31] 1 Strachan-Davidson, *Problems of the Roman Criminal Law* (1912) 112-113.

[32] Although such things are still within the competency of Parliament, the abortive bill of pains and penalties brought against Queen Caroline is probably the last of its kind.

[33] See *Thompson* v. *Carr* (1831) 5 N. H. 510; *Cooper* v. *Telfair* (U. S. 1800) 4 Dall. 14; *Sleight* v. *Kane* (N. Y. 1801) 2 Johns. 236; *Jackson* v. *Sands* (N. Y. 1801) 2 Johns. 267.

[34] 1 Strachan-Davidson, *Problems of the Roman Criminal Law* (1912) 237-238.

[35] "It would be dreadful if any one were to hinder the people doing what it liked." Xenophon, *Hellenica*, I, 7, 12.

sentences, and might procure a mitigation of their effect.[36] Accordingly, it has been said, "So far as citizens were concerned, the criminal law of the Roman republic, in spite of abundant threats of capital punishment, became in practice the mildest ever known in the history of mankind."[37] The parallel with our own criminal law is striking. In Anglo-American criminal law, as a result of the contests between courts and crown in seventeenth-century England, the accused came to be thought of as matched against the king. The common law, declared in bills of rights, came to be thought of as standing between the individual and the state, as protecting the individual from oppression by the agents of the king or of the state.[38] Thus over-emphasis upon the second of the two sides of the criminal law marks nineteenth-century American law no less clearly than it marks the law of republican Rome.

In the middle of the first century B. C. one Damio, a freedman of the notorious Clodius, who had committed every sort of violent crime, was seized by the Praetor. The Tribune Novius, in releasing him said: "Although I have been wounded by this hanger-on of Clodius and driven from my official duties by armed men distributed in garrisons and Gn. Pompeius has been besieged by them, yet when appeal is made to me I will not follow the example of him with whom I find fault, and I will quash this sentence."[39] Strachan-Davidson says of this: "Men who could applaud such absurdities deserved to have the criminal class continually flourishing in their midst."[40] Yet one can imagine a historian of Anglo-American criminal law two thousand years hence setting forth the oft-told stories: how in the nineteenth century the Supreme Court of one of our states reversed a conviction of rape because the word "the" was lacking in the averment of contravention of the peace and dignity of the state;[41] how the court of criminal appeals of another state reversed a conviction for murder because the written verdict found the accused guilty in the "fist"[42] degree; how in another case a written verdict of "guity"[43] was held of no effect and a verdict assessing as punishment imprisonment in the state "penty" was held fatally bad.[44] No doubt he also will say that nineteenth-century America deserved to have the criminal class that undoubtedly flourished in its cities and on its frontiers. But there is another side. For we may well ask whether Rome was so much

[36] 1 Strachan-Davidson, *Problems of the Roman Criminal Law* (1912) 114. Even if we do not accept entirely his theory of capital trials before the Roman people, this point seems well taken.
[37] *Ibid.*
[38] 2 Kent, *Commentaries* (14th ed. 1896) 1-11.
[39] Asconius on Cicero, *Pro Milone,* translated in 1 Strachan-Davidson, *Problems of the Roman Criminal Law* (1912) 168.
[40] *Ibid.* 169.
[41] *State* v. *Campbell* (1908) 210 Mo. 202, 109 S. W. 706.
[42] *Wooldridge* v. *State* (1883) 13 Tex. App. 443.
[43] *Harwell* v. *State* (1886) 22 Tex. App. 251, 2 S. W. 606.
[44] *Keeler* v. *State* (1878) 4 Tex. App. 527.

better off under the more efficient criminal justice of the empire. We may compare with the Roman tribune of the later republic the Roman governor of a province under the empire, who acted both as public prosecutor and as judge,—as English judges did in the days of the Stuarts,—and had to be admonished by Hadrian that a letter of a committing magistrate sending an accused to the governor for trial must not be taken as conclusive of his guilt.[45] In like manner, one may well pause to inquire whether we in America shall necessarily be so much better off under the more efficient administrative criminal justice that we seem determined to fasten upon ourselves in the twentieth century.[46]

What we need to observe is that legal history shows a continual movement back and forth between an extreme solicitude for the general security and the security of social institutions, leading to a minimum of regard for the interests of the individual accused and reliance upon summary, unhampered, arbitrary administrative punitive justice; and at the other extreme excessive solicitude for the social interest in the individual life, leading to a minimum of regard for the general security and security of social institutions and reliance upon strictly regulated judicial punitive justice, hampered at all points by checks and balances and technical obstacles. At Rome, when archaic modes of social control did not secure paramount social interests, they are followed by development of the disciplinary power of the military commander into an arbitrary and summary power of the magistrate to deal with crime.[47] So later, when the over-mild criminal law of the republic did not sufficiently secure paramount social interests, it was followed by the rise of imperial exercise of the whole magisterial power. Likewise in England, the medieval legal checks upon punitive justice were followed by the rise of the Star Chamber and other forms of executive criminal administration. The exaggerated legalism of nineteenth-century administration of the criminal law is being followed hard today by the rise of administrative justice through boards and commissions. The over-technical tenderness for the offender in the nineteenth century is giving way to an over-callousness, to violation of the constitutional rights of accused persons in the supposed interest of efficient enforcement of the penal laws. American prosecutions today are coming to be conducted with a ferocity without parallel in common-law trials since the Stuarts. The reports are coming to be filled with speeches of prosecutors for which we can only find a parallel in the harangues of Jeffreys and his colleagues.[48] The spectacle of a federal court com-

[45] Dig. XLVIII, 3, 6 (Marcianus).

[46] See Pound, *The Revival of Personal Government* (1917) Proc. N. H. Bar Ass'n. 13.

[47] Mommsen, *Römisches Strafrecht* (1899) 39, n. 4, 135, 475.

[48] See note *Lawless Enforcement of Law* (1920) 33 Harvard Law Rev. 956; Sir Frederick Pollock's observations in (1920) 36 Law Quarterly Rev. 335-336.

mitting witnesses for contempt during the course of a state trial, because they could not swear up to the mark on behalf of the prosecution, requires us to turn back to Jeffreys at the trial of Alice Lisle in order to find another example.[49] Excessive securing of the technical rights of accused persons in the nineteenth century produced the third degree just as the excessive zeal of prosecutors, browbeating of witnesses and unreasonable searches of the seventeenth and eighteenth centuries produced the criminal procedure of the nineteenth century. No one who has reflected on the history of the criminal law can doubt that these things in their turn will be followed by some such reaction as that which superseded the executive justice of the Star Chamber by the system of excessive limitations upon prosecutions which became classical in our polity.

To put it once more in another way, for this constant movement back and forth cannot be too much insisted upon, in Roman law, summary maintaining of the general security by mob justice, by royal paternal power, by private self help, by magisterial *imperium* and by *ex post facto* legislative action, was succeeded by extreme limitations upon social control through a strict criminal law and the intervention of tribunes, so that, it has been said, just as Anglo-American law allows every dog one bite, so every Roman citizen of the republic might commit one capital crime with impunity.[50] But this in turn was followed by the magisterial administrative justice of the empire. In our law, the rough and ready punitive justice of the hue and cry was followed by the strict criminal law of the later middle ages. That in turn was followed by the rise of executive criminal justice in the sixteenth and seventeenth centuries, and the latter in time gave way to the ultra-strict limitations of the nineteenth century. But we may see already that tribunals of the sixteenth and seventeenth century type are setting up on every hand. Nor need we stop here. Garraud says of modern France that "two tendencies divide the domain of the criminal sciences. The classical school is above all individualistic, demanding new safeguards in favor of the accused, a continual control over the criminal authorities, the diminution of arbitrariness and the increase of liberty. The modern school, which is above all collectivist, desires to strengthen the social defense, to deprive the prisoner of those safeguards which are summed up in the presumption of innocence, to substitute for a humanitarian procedure a scientific procedure, to transform the penal action into a clinical examination and the judges into expert specialists who must have a very special education in psychology, anthropology and criminal sociology."[51] In other words, in Continental Europe, a

[49] *Ex parte Hudgings* (1919) 249 U. S. 378; *Rutherford* v. *United States* (C. C. A. 1919) 258 Fed. 855.

[50] 1 Strachan-Davidson, *Problems of the Roman Criminal Law* (1912) 169.

[51] Translated in Esmein, *History of Continental Criminal Procedure* (1913) 41-42 (Continental Legal History Series, vol. 5).

free magisterial inquiry came to be limited legally and to have the check of a jury imposed upon it, under the influence of the classical school, and a reaction has followed which is represented by the modern school.

The condition of internal opposition, which has produced this continual movement from wide magisterial power to narrowly limited formal procedure beset with checks and then back to summary and arbitrary administrative action, is inherent in criminal law. Criminal law exists to maintain social interests as such. But the social interest in the general security and the social interest in the individual life continually come into conflict and in criminal law, as everywhere else in law, the problem is one of compromise, of balancing conflicting interests and of securing as many as may be and as completely as may be with the least sacrifice of other interests. In criminal law the most insistent and fundamental of social interests are involved. Civilized society postulates peace and good order, security of social institutions, security of the general morals and conservation and intelligent use of social resources. But it demands no less that free individual initiative which is the basis of economic progress, that freedom of criticism without which political progress is impossible, and that free mental activity which is a prerequisite of cultural progress. Above all it demands that the individual be able to live a moral and social life as a human being. These claims, which may be put broadly as a social interest in the individual life, continually trench upon the interest in the security of social institutions and often, in appearance at least, run counter to the paramount interest in the general security. Compromise of such claims, for the purpose of securing as much as we may, is peculiarly difficult. The far-reaching nature of the interests involved calls for the best of which the science of law is capable.

Unhappily instead of intelligent compromise, our juristic theory of the past has sought to proceed on the basis of one of the two contending elements exclusively. Seventeenth and eighteenth century theories of natural rights exalted the social interest in the individual life at the expense of the social interest in the general security. They thought of the criminal law as an infringement of natural rights, which were fundamental and universal qualities of human beings. As such it had to be justified by deriving its rules, its sanctions and its authority in some fashion from the free will of the offender himself.[52] In the nineteenth century, the fashion of juristic thinking sought to make the individual free will, as an ultimate metaphysical *datum,* the starting point of all legal obligation.[53] As our present-day theories of criminal

[52] "The social treaty has as its end the preservation of the contracting parties. He who desires the end desires also the means, and some risks, even some losses, are inseparable from these means." Rousseau, *Contrat Social* (1762) liv. 2 chap. 5.

[53] "The injury which the criminal experiences is inherently just because it expresses his own inherent will; is a visible proof of his freedom." Hegel,

law took form when such ideas were dominant, it was inevitable that the second of the two elements that make up the criminal law historically—namely, limitations on magisterial enforcement of the prohibitions imposed to maintain the general security—that this second element should receive the whole emphasis. Thus the entire philosophical and theoretical equipment of the American lawyer with respect to the nature and the basis of the criminal law ignored an element that is at least half of the subject and became so at variance with the exigencies of the social interest in the general security as to be felt by sociologists to be anti-social. [54]

Two circumstances have served to keep this one-sided theory of criminal law alive. One is the traditional fear of magisterial caprice which leads the lawyer instinctively to scout all new projects lest in essaying improvement an opening be made unwittingly for the arbitrary and the wilful. Another and more serious circumstance is the close connection of criminal law with politics. There is little danger of political oppression through civil litigation. With much reason there is constant fear of political oppression through the criminal law. Not only is one class or group suspicious of attempts by another to force its ideas upon the community under penalty of prosecution, but the power of a majority to visit with punishment practices which a strong minority consider in no wise objectionable, is liable to abuse, and whether rightly or wrongly used puts a strain upon criminal law and its administration. Moreover, this close relation of criminal law to politics tempts prosecuting officers, when the public conscience is active, to be spectacular at the expense of justice and, when it is sluggish, to be lax for fear of offending dominant interests. Judicial justice, with all its incidental inhibitions, appeafs to be necessary as a check upon the political, since administrative punitive justice has always been peculiarly susceptible to political influence. Thus the connection of criminal law and politics aggravates one of the inherent difficulties in the administration of punitive justice.

"It is one great advantage of popular government over government of the older type," says Sir Henry Maine, "that it is so intensely interesting." He adds that the second empire in France "never overcame the disadvantage it suffered through the dulness of its home politics." [55] On the other hand it is one great disadvantage of the criminal law that in action it is so interesting to the layman. When he thinks of

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Philosophy of Right (Dyde's transl. 1896) 97. "I define liberty as being the permission or power to do what one pleases to do without any external restraint." "Every abridgment of it demands an excuse, and the only good excuse is the necessity of preserving it." Carter, *Law: Its Origin, Growth and Function* (1907) 133, 337.

[54] For a recent discussion from this standpoint, with some significant statistics, see Fosdick, *American Police Systems* (1920) 29-34. See also Train, *The Prisoner at the Bar* (1906) c. 17.

[55] *Popular Government* (Amer. ed. 1886) 147-148.

law it is likely to be in terms of the criminal code, for that is the type of law that figures chiefly in the morning paper. Tony Weller was not unique in his belief that the practice of all the English courts was regulated by that of the Old Bailey. To the average layman a trial is a criminal trial, a lawyer is a criminal trial lawyer, a law is prohibition under penalty. Hence every lay lawmaker turns instinctively to the criminal law when he comes to provide a sanction for his new measure and every new statute adds one more to the mass of prescribed penalties for which a criminal prosecution may be invoked. In a state of which I have knowledge, whose statute book is by no means as bulky as that of some of its neighbors, there are one thousand and fifty-one crimes defined by criminal code or by special statute. It is self evident that so many provisions for criminal prosecution deprive each other of efficacy, if only by distracting the attention of the public prosecutor.[56] But the attractiveness of the criminal law to the lay mind stands in the way of serious study of how to make our huge annual output of legislation more effective for its purpose.

Nor is over-use of criminal law the only ill consequence of its peculiar interest to the layman. Ambitious but inexpert reformers turn first of all to penal legislation and are eager to see the work of their hands in a new or a remade section of the penal code. Whenever the public become alarmed in a period of transition and unrest there is an orgy of drastic penal legislation.[57] But the most unhappy feature of this interest of the criminal law for the lay public is its effect upon prosecutors. The office of the prosecutor in a democracy, with its conspicuous opportunities for catching and holding the public eye and of making a sensational prosecution a stepping stone to political preferment, offers sore temptation to public prosecutors, justifying many traditional restraints of the common law of which we ought to be able to rid ourselves.[58] The parallel between a law officer of the crown under Charles II or James II and an American prosecuting attorney has much to suggest to us. One sought the favor of King Rex, on whose pleasure his political future hung, by getting at all costs the victim whom his royal master or his master's courtiers had picked for condemnation. The other seeks the favor of King Demos, on whose pleasure his political future depends, by striving to get at all costs the victim whom Demos or his courtiers of the press has tried in advance and condemned. The spectacle of press, public and prosecutor in full cry in a man hunt is revealed in every recent volume of law reports. It is to the credit of a common-law judiciary that judges even

[56] See Fosdick, *American Police Systems* (1920) 46-57.

[57] See the remarks of Judge Parker on this subject, *The Congestion of Law* (1909) 29 Rep. Am. Bar Ass'n, 383, 387 ff.

[58] The political activities of elective judges and the control of the head of the federal prosecuting system over federal judges must also be borne in mind. Works, *Juridical Reform* (1919) 123-125.

when elected for short terms, have rarely joined in such proceedings.

Thus examination of the law reports of to-day must convince us that the need for a bill of rights has not passed, that whatever the theory behind them, whatever the historical reasons behind them, they are still a wise bit of social engineering; that the balance between the social interest in the general security and the social interest in the life of the individual cannot be kept, in view of the connection of criminal law with politics and the temptations to which public prosecutors are exposed in a democracy, except by resort to a body of legal safeguards, imposed deliberately and dispassionately in advance and put beyond reach of the excitement of the moment. Progress in criminal law is not to be had by ridding ourselves of them, but rather by delivering them from historical pedantry and traditional accretions of technicality; by studying them functionally that we may make them instruments of justice under the conditions of to-day; by seeing to it that they do not decay into formal obstructions, of no service to the innocent and the oppressed, and mere instruments of cunning to retard the due treatment of the guilty.

Granting that there is an inherent internal opposition in the ends of the criminal law, granting that we must expect a strong reaction from the over-tenderness for the accused and over-strict limitation of the prosecutor in our nineteenth-century law, and yet may not expect to do away with legal checks, judicial administration, with all that it implies, and bills of rights—granting these things, in the twentieth century we ought to have made enough progress in legal science to be able to better the primitive plan of swinging back and forth alternately from free, summary, arbitrary administrative action to the extreme of hard and fast restraint upon vindication of the social interest in the general security against the anti-social individual. Surely we are not bound to go on forever in the vicious circle of the past. We are told that the native inhabitants of British India, holding that disease is an infliction of the gods, not only refuse to take sanitary precautions of their own accord but resent the precautions to which the British government compels them. To them an epidemic is a natural phenomenon as much to be left to itself as the succession of day and night.[59] We have been treating criminal law in much the same fashion. In a time when every other sort of teaching and study and research are liberally endowed, there are no endowments for teaching or study or research in the criminal law. We leave the practice of the criminal law to the lowest stratum of a largely untrained and no longer necessarily learned profession. We leave the theory of the criminal law to go on in the old grooves and do nothing within the profession nor in the professional schools to make it a better instrument. Yet one may see readily on

[59] 1 Roberts, *Forty-One Years in India*, 442.

looking beneath the surface that the absolute theories of the past and their bad influence on legal thought are a prime cause of the unsatisfactory condition of criminal law which is so generally recognized. It is a reproach to our profession that in its thinking on this subject it still adheres either to the eighteenth-century idea of natural rights as qualities of human beings which led to the setting up of absolute barriers beyond the reach of legislation and impervious to non-legal reason, or to the nineteenth century will-philosophy, with its ideas of free will, vicious will and abstract will, which modern psychology has wholly undermined.

I concede that there is a kernel of truth in these traditional legal theories. We may not ignore the element of limitation upon magisterial enforcement of the prohibitions of criminal law and pin our faith wholly in administrative agencies that look upon criminal law purely from the standpoint of these prohibitions. Improvement, not to say perfection, of the criminal law cannot be achieved without lawyers, who alone have command of that body of continuous and long continued experience of the legal handling of concrete cases which is an indispensable quarry of materials for the reformer of law. Yet it cannot be achieved solely by lawyers. It calls for co-operation of penologist, psychologist, and sociologist, and perhaps of many more. Above all, however, it will not achieve itself.

Scientific study of law is no less important to the community than scientific study of medicine. Few diseases threaten civilization more persistently than the manifold forms of anti-social action that we call crimes. Some part of the millions that are annually devoted to study of the former might be made to yield rich results if used to endow study of the latter. The faith in legislatures that leads us to commit this subject to time and chance is as naïve as the faith of the Hindu who, when an epidemic of cholera is raging, can see no harm in using the same tank for drinking purposes and for bathing and washing his clothes. The legal science of to-day, with its functional attitude, its study of law in action as well as law in books, its insistence upon justice through rules in contrast to abstractly just rules, and its insistence upon the limitations on effective legal action and the importance of discovering means of making legal rules achieve their purpose, could be made to do great things in the domain of criminal law. We ought to have some of the best minds in our law schools at work to discover how and how far the criminal law actually secures the social interests which we rely upon it to secure; they should be studying how far it is possible in practice to secure these interests and their manifold phases by means of criminal law; they should be studying how criminal law and judicial administration thereof may be made to do that part of the task of maintaining and furthering civilization for which they are fitted and of which they are capable in the most effective way with the least sacrifice

of the social interest in the individual human life. Work of this sort goes on in medical schools, in engineering schools, and in chemical laboratories, where our faith in political machinery does not blind us. Yet the problem of giving practical effect in action to a principle of securing as many interests as we may with the least sacrifice of other interests, or specifically in criminal law, the problem of maintaining the general security, the security of social institutions and the general morals at the maximum compatible with the least sacrifice of the interest in the individual moral and social life, calls for as long-continued, as profound, as scientific study and research as any with which our richly endowed laboratories are busied.

Not by an analytical scheme or rigid system worked out logically in libraries on the sole basis of books and law reports, which has been the lawyer's idea; not by abandoning the experience of the past preserved in the law reports and turning exclusively to administrative non-legal expert agencies, which is the idea of the layman, may we expect to achieve lasting results. The condition of criminal law calls for continuous intelligent bringing to bear upon the fundamental problem and its applications in detail of all that legal and social and medical science have worked out. Such study, such research, is as worthy of support, as deserving of endowment and would yield as fruitful results as any of the manifold forms of scientific research that are receiving such support and endowment on every hand. Upon such study and the thoroughness with which it is done the future of the criminal law depends.

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